69

Supreme Court, U.S.
FILED
07-453 OCT 01 2007
OFFICE OF THE CLERK

No. _____

In The

# Supreme Court of the United States

RICHARD A. CANATELLA,

*Petitioner,*

v.

JOHN K. VAN DE KAMP, et al.,

*Respondents.*

**On Petition For A Writ Of Certiorari To The Ninth Circuit Court Of Appeals**

## PETITION FOR WRIT OF CERTIORARI

RICHARD A. CANATELLA
COTTER & DEL CARLO
4610 Mission Street, Suite 203
San Francisco, CA 94112
(415) 584-5446

*Attorneys for Petitioner*

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342 2831

## QUESTION PRESENTED

Is the "judicial power" clause, U.S. Const. art. III, §§ 1, cl. 1, implicated by the Ninth Circuit Court of Appeals declining to apply its own precedent that publication of the same defamatory material on two different Internet website addresses is not a "single publication" or mere "continuing impact," but constitutes a separate actionable publication in the instant federal civil rights defamation case?

## PARTIES TO THE PROCEEDING

RICHARD A. CANATELLA, Petitioner

JOHN K. VAN DE KAMP, ESQ., MARIE M. MOFFAT, ESQ., JAY M. GOLDMAN, ESQ., NANCY P. McCARTHY, editor and general manager of the CALIFORNIA BAR JOURNAL, ROBERT A. HAWLEY, ESQ., RICHARD J. ZANASSI, ESQ., officials of the State Bar of California sued in their official capacities, and MARTHA L. DAETWYLER, ESQ., Respondents

TABLE OF CONTENTS


| | Page |
|---|---|
| QUESTION PRESENTED | i |
| PARTIES TO THE PROCEEDING | ii |
| OPINION BELOW | 1 |
| JURISDICTION | 1 |
| RELEVANT PROVISIONS INVOLVED | 1 |
| STATEMENT | 3 |
| A. BACKGROUND OF THIS §§ 1983 DEFAMATION ACTION | 3 |
| B. HISTORY OF THE PROCEEDINGS | 8 |
| REASONS FOR GRANTING THE PETITION | 10 |
| I. THIS CASE RAISES AN IMPORTANT FEDERAL QUESTION: WHETHER ARTICLE III IS IMPLICATED BY THE NINTH CIRCUIT DECLINING TO FOLLOW CIRCUIT PRECEDENT IN *OJA* | 10 |
| II. THERE IS AN INTER-CIRCUIT CONFLICT ON THE QUESTION WHETHER ART. III IS A CONSTITUTIONAL LIMITATION ON HOW COURTS TREAT PRECEDENT | 14 |
| A. THE EIGHTH CIRCUIT CONCLUDED THAT THE DOCTRINE OF PRECEDENT LIMITS THE "JUDICIAL POWER" UNDER ART. III | 14 |
| B. *HART*'S CALL FOR UNLIMITED JUDICIAL CONTROL OF THE LAW AND PRECEDENT SHOULD BE REJECTED | 20 |

TABLE OF CONTENTS – Continued

Page

CONCLUSION ..... 27

APPENDIX

*Canatella v. Van De Kamp*, 486 F.3d 1128 (9th Cir. 2007) (*Canatella*) ..... App. 1

*Canatella v. Van De Kamp*, 2005 U.S. Dist. LEXIS 38797 (N.D. Cal. Dec. 13, 2005) ..... App. 23

Denial of Petition for Rehearing and Rehearing En Banc (July 2, 2007) ..... App. 35

# TABLE OF AUTHORITIES

Page

CASES

*Anastasoff v. United States*, 223 F.3d 898, vacated as moot on reh'g en banc, 235 F.3d 1054 (8th Cir. 2000) ..... *passim*

*Canatella v. California*, 304 F.3d 843 (9th Cir. 2002) ..... 3

*Canatella v. Van De Kamp*, 2005 U.S. Dist. LEXIS 38797 (N.D. Cal. Dec. 13, 2005) ..... 1

*Canatella v. Van De Kamp*, 486 F.3d 1128 (9th Cir. 2007) ..... *passim*

*Cooper v. Dupnik*, 924 F.2d 1520 (9th Cir. 1991) ..... 8

*Dorsey v. National Enquirer, Inc.*, 973 F.2d 1431 (9th Cir. 1992) ..... 7

*Hart v. Massanari*, 266 F.3d 1155 (9th Cir. 2001) ..... *passim*

*Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803) ..... 15, 16

*Masson v. New York Magazine, Inc.*, 501 U.S. 496 (1991) ..... 7

*Oja v. United States Army Corps of Eng'rs*, 440 F.3d 1122 (9th Cir. 2006) ..... *passim*

*Paul v. Davis*, 424 U.S. 693 (1976) ..... 7, 8

*Sadallah v. City of Utica*, 383 F.3d 34 (2d Cir. 2004) ..... 7

*Vanelli v. Reynolds School District No. 7*, 667 F.2d 773 (9th Cir. 1982) ..... 8

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONS, STATUTES AND RULES

42 U.S.C. §§ 1983 ..... 1, 5

Eighth Circuit Rule 28A(i) ..... 14

Cal. Bus. & Prof. Code §§ 6086.1(a)(1) ..... 4

Cal. Civ. Code §§ 3425.3 (2005) ..... 2

Cal. Code Civ Proc §§ 335.1 (2005) ..... 2

Fed.R.Civ.P. 11 ..... 7

Fed.R.Civ.P. 15(a) ..... 9

U.S. Const. art. III, §§ 1, cl. 1 ..... *passim*

OTHER AUTHORITIES

G. Burgess Allison, *The Lawyer's Guide to the Internet* 60 (1995) ..... 13

Byron C. Keeling, *Toward a Balanced Approach to "Frivolous" Litigation: A Critical Review of Federal Rule 11 and State Sanctions Provisions*, 21 Pepp. L. Rev. 1067 (1994) ..... 7

Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 Harv. L. Rev. 1362, 1363-64 (1953) ..... 21

J.H. Baker, *An Introduction to English Legal History* 227 (1990) ..... 17

Joseph Story, *Commentaries on the Constitution of the United States* §§ 377-78 (1833) ..... 19

TABLE OF AUTHORITIES – Continued

Page

Morton J. Horwitz, *The Transformation of American Law*: 1780-1860, at 8-9 (1977) ..... 17

Penelope Pether, *Inequitable Injunctions*: *The Scandal of Private Judging in the U.S. Courts*, 56 Stan. L. Rev. 1435, 1450, 1487 (2004) ..... 27

Pierre Bourdieu, *The Logic of Practice* 53, n. 17 ..... 24

Shubha Ghosh, *Gray Markets in Cyberspace*, 7 J. Intell. Prop. L. 18, n. 35 (1999) ..... 13

Sir William Holdsworth, *Case Law*, 50 L.Q.R. 180 (1934) ..... 17

1 William Blackstone, *Commentaries* *69 (1765) ..... 17

## OPINION BELOW

*Canatella v. Van De Kamp,* 486 F.3d 1128 (9th Cir. 2007) (*Canatella*), affirming dismissal of the complaint in *Canatella v. Van De Kamp*, 2005 U.S. Dist. LEXIS 38797 (N.D. Cal. Dec. 13, 2005).

## JURISDICTION

The Ninth Circuit Court of Appeals issued its published opinion May 3, 2007. Petitioner timely petitioned for rehearing and rehearing en banc May 17, 2007. The petition was denied July 2, 2007. This Court has jurisdiction under 28 U.S.C. § 2101(c), and the petition is timely under Supreme Court Rule 13.3.

## RELEVANT PROVISIONS INVOLVED

United States Constitution, art. III, §§ 1, cl. 1, states in relevant part:

> The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. . . .

42 U.S.C. §§ 1983, states in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or

other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, . . .

Cal. Code Civ Proc §§ 335.1 (2005)

Within two years: An action for assault, battery, or injury to, or for the death of, an individual caused by the wrongful act or neglect of another.

Cal. Civ. Code §§ 3425.3 (2005)

No person shall have more than one cause of action for damages or libel or slander or invasion of privacy or any other tort founded upon any single publication or exhibition or utterance, such as any one issue of a newspaper or book or magazine or any one presentation to an audience or any one broadcast over radio or television or any one exhibition of a motion picture. Recovery in any action shall include all damages for any such tort suffered by the plaintiff in all jurisdictions.

## STATEMENT

### A. BACKGROUND OF THIS §§ 1983 DEFAMATION ACTION.

Petitioner has been licensed to practice law in California since 1972.[1] Prior to 1998, Petitioner had no record of discipline before any court or bar. From 1989 through 1996, however, he assumed responsibility for a profile case involving a "shaken baby" murder charge against a babysitter, and alleged civil rights violations in debt collection practices by a reputable San Francisco law firm. In these two cases petitioner was sanctioned twenty-five times. The sanctions concerned Petitioner's advocacy of his clients' interests in judicial proceedings. *See Canatella v. California,* 304 F.3d 843, 847 (9th Cir. 2002).

The State Bar of California issued disciplinary charges alleging the speech was, *inter alia*, moral turpitude and Petitioner and the Bar stipulated to a one-month suspension and eighteen months probation, which Petitioner successfully completed. When the California Supreme Court approved that agreement

---

[1] Petitioner is also admitted to the District of Columbia bar, the bars of the United States District Courts for the Northern and Central districts of California, the Ninth Circuit Court of Appeals, the United States Court of Military Appeals, and the Supreme Court of the United States.

in August 1999, the suspension became part of Petitioner's public disciplinary record.[2]

In February 2000, the State Bar of California published in the *California Bar Journal*, its official publication mailed only to members of the California Bar, a false and misleading statement of the stipulation. Petitioner read the statement which follows:

> RICHARD A. CANATELLA [# 53264], 61, of San Francisco was suspended for 18 months, stayed, placed on 18 months of probation with a 30-day actual suspension, and was ordered to take the MPRE within one year. The order took effect Sept. 17, 1999. Canatella stipulated to filing numerous frivolous actions in courts in San Mateo, San Francisco, and Santa Clara county courts (sic), as well as in the (sic) California Court of Appeal (sic) and federal district and appeals courts. Six were civil matters he filed relating to a criminal case in which he represented a babysitter who was convicted of second degree murder and felony child abuse. The civil cases, filed on behalf of the babysitter and her parents, who owned the house where she lived, included legal malpractice, insurance bad faith, and allegations that various defendants conspired to deprive his clients of their constitutional rights. Canatella's

---

[2] *See* Cal. Bus. & Prof. Code §§ 6086.1(a)(1) providing that "records of original disciplinary proceedings in the State Bar Court shall be public."

> involvement in nine other matters also was the subject of discipline. Sanctions were ordered against him or his clients 37 times. Courts repeatedly found him responsible for frivolous, meritless and vexatious actions. Sanctions totaled more than $18,000 in one matter, and the opposing parties were granted all fees and costs in another. In one case, a federal judge said, "This complaint is a paradigm for 'frivolous.'" Wrote another federal jurist: "Plaintiff's repeated attempt to challenge the sanctions and judgments . . . in the face of clear authority that his claim is frivolous evidences his bad faith and wrongful purpose." In mitigation, Canatella has no record of discipline since beginning to practice law in 1972 and he demonstrated his good character by presenting testimonials from eight people, including four attorneys and three judges. He also presented a lengthy list of his professional accomplishments.

*Canatella v. Van De Kamp,* 486 F.3d 1128, 1130-1131 (9th Cir. 2007) (*Canatella*).

Petitioner alleged in the foregoing §§ 1983 civil rights action filed June 15, 2005, that the defamatory statement of his discipline record was first published in print, and then in the on-line version of the California Bar Journal, and then republished on Petitioner's official membership records website accessible to the public on *Google*. After the single issue of the Bar's official newspaper was published in print and mailed to attorney members of the State Bar, unbeknownst to

Petitioner, the State Bar published the statements at issue to the public at large by placing the statements permanently and continuously on Petitioner's official membership records Internet website under Petitioner's name where almost all prospective clients look before hiring an attorney.

Petitioner's official membership records website has a different Internet address and URL than the one where the State Bar published its on-line version of the single issue of the California Bar Journal where the statements first appeared. The attorney membership records website is also directed to a different audience than the *California Bar Journal* website. Rather, the attorney membership records website is directed toward informing the consuming public and assisting the public in making an informed decision whether to hire a particular lawyer. Conversely, the print version of the *California Bar Journal* is mailed exclusively to attorneys; it is a different publication than the permanent and continuing attorney membership records website directed toward the public at large.

The false and misleading nature of the statements are apparent in that it is conceded that the State Bar falsely stated that there were 37 sanctions when there were 26. The statements also do not mention the 26 sanctions were over a nine-year period, or an average of less than three sanctions a year in Petitioner's active litigation practice. Nor do the statements mention the sanctions involved novel and politically sensitive issues, attempted expansions

of legal concepts to fit current situations, and that the sanctions were often relatively small amounts for less major issues. Further, the public was not advised that the sanctions statutes were modified (*i.e.*, Fed.R.Civ.P. 11) and the impact of the modification was more pronounced during the nine-year period when Petitioner received the sanctions and that during the period many such sanctions were routinely imposed on lawyers.[3]

Moreover, the statements were misleading, quoting two judges out of context without indicating the judges' comments were made over four years apart: one said a complaint was a "paradigm for frivolous," and another said that the client, *i.e.*, the plaintiff, and not Petitioner, had a "frivolous" claim in his repeated attempts to challenge court sanctions and judgments. The summary used a common misleading journalistic narrative technique by collapsing time and thus did not meet the rational interpretation standard of *Masson v. New York Magazine, Inc.*, 501 U.S. 496 (1991). The statements further mislead by anecdote and did not provide, as required by *Dorsey v. National Enquirer, Inc.*, 973 F.2d 1431, 1436 (9th Cir. 1992) a fair and true report. In sum, the statements carried an unfair and misleading sting, an actionable "stigma plus," *see Sadallah v. City of Utica*, 383 F.3d 34, 38 (2d Cir. 2004), citing *Paul v.*

---

[3] *See* Byron C. Keeling, *Toward a Balanced Approach to "Frivolous" Litigation: A Critical Review of Federal Rule 11 and State Sanctions Provisions*, 21 Pepp. L. Rev. 1067, 1075 (1994).

*Davis*, 424 U.S. 693, 701-10 (1976),[4] to brand an over-thirty-year practicing attorney as incompetent, though Petitioner had no prior public record of any malpractice or discipline. In sum, by republishing the statements on Petitioner's official membership records, accessible to the public on *Google*, the Bar effectively branded petitioner with a scarlet letter for life.

## B. HISTORY OF THE PROCEEDINGS.

Petitioner filed this action June 15, 2005, seeking damages and prospective relief for the Bar's publication of the allegedly false and misleading statement on Petitioner's official membership records website. On July 11, 2005, Petitioner filed a first amended

---

[4] To prevail on a "stigma plus" claim, a plaintiff must show (1) the utterance of a statement "sufficiently derogatory to injure his or her reputation, that is capable of being proved false, and that he or she claims is false," and (2) a material state-imposed burden or state-imposed alteration of the plaintiff's status or rights. *Paul*, 424 U.S. at 701-02, 710-11. The state-imposed burden or alteration of status must be "in addition to the stigmatizing statement." *Id.* (emphasis added). *Cooper v. Dupnik*, 924 F.2d 1520, 1532 (9th Cir. 1991) ("[t]o state a claim for defamation under section 1983, a plaintiff must allege loss of a recognizable property or liberty interest in conjunction with the allegation of injury to reputation," citing *Vanelli v. Reynolds School District No. 7*, 667 F.2d 773, 777-78 (9th Cir. 1982) ("the procedural protections of due process apply if the accuracy of a charge impairing a citizen's reputation for honesty or morality is contested, there is public disclosure of the charge, and it is made in connection with the alteration of some right or status recognized by state law").

complaint, as of right pursuant to Fed.R.Civ.P. 15(a). **ER 116, Dock. Nos. 8 & 9.**[5] Respondents moved to dismiss on statute of limitations and other grounds. **ER 116, 117, Dock. Nos. 11 & 17.** Meanwhile, the district court granted Petitioner leave to file a second amended complaint. **ER 118, Dock. No. 32.** Respondents filed supplemental memoranda. Petitioner filed opposition papers and the matter was heard October 12, 2005.

On December 19, 2005, the district court granted Respondents' motion to dismiss on statute of limitations grounds. Petitioner appealed and in a published opinion filed May 3, 2007, the Ninth Circuit affirmed. It concluded that under California law the different publications to different audiences were barred by the single publication rule before Petitioner filed the instant action June 15, 2005. *Canatella* at 1132.

On May 17, 2007, Petitioner timely petitioned for rehearing and rehearing en banc, asserting that the panel declined to follow binding precedent involving a similarly situated litigant in *Oja v. United States Army Corps of Eng'rs*, 440 F.3d 1122 (9th Cir. 2006) (*Oja*). The petition was denied July 2, 2007, and Judgment for Respondents was entered July 11, 2007. This timely petition for the Writ of Certiorari follows.

---

[5] Petitioner cites to the exerpts of record in the Ninth Circuit Court of Appeals.

## REASONS FOR GRANTING THE PETITION

### I. THIS CASE RAISES AN IMPORTANT FEDERAL QUESTION: WHETHER ARTICLE III IS IMPLICATED BY THE NINTH CIRCUIT DECLINING TO FOLLOW CIRCUIT PRECEDENT IN *OJA*.

*Oja* concluded that the single publication rule would not apply to placement of the same information at "a different internet address" as that "constitutes a separate and distinct publication – one not foreclosed by the single publication rule – and (USACE) might be liable for a separate violation of the Privacy Act." *Oja*, 440 F.3d at 1133-34.[6] Petitioner's case presented an identical situation.

---

[6] *Oja* presented "a novel question in this circuit: when does a cause of action accrue for an unauthorized, Internet-borne publication of information protected by the Privacy Act?" *Oja*, 440 F.3d at 1128. *Oja* held that the plaintiff's claims were barred by the Privacy Act's two-year statute of limitations since the first posting had occurred more than two years before the plaintiff brought suit and the plaintiff conceded that he had seen that posting more than two years before he filed suit. *Oja* at 1125, 1133. *Oja* also held that the "[a]pplication of the single publication rule to Internet publication was not inconsistent with" federal law because that rule focuses a plaintiff's "claims against a defendant, thereby economizing judicial resources while preserving the plaintiff's ability to bring the claims." *Oja* at 1133. Moreover, the same panel that decided *Oja* reached the same conclusion in *Canatella*, namely, that both suits for the allegedly defamatory cyber disclosures were untimely on "single publication" grounds.

The Ninth Circuit remarked, "at first glance [the italicized] language might appear to support Canatella's claim that his cause of action is not barred by the single publication rule since *the first publication appeared at a slightly different URL address* [than the second publication]." *Canatella,* 486 F.3d at 1134, emphasis added. However, *Canatella* declined to follow *Oja*'s conclusion that the common law *multiple publication rule* applied to the second publication in *Oja*:

> In March 2003, *Oja* filed a Second Amended Complaint, alleging that the USACE published the same private information at a different Internet address in December 2000. *If, in fact, the USACE published the same private information at a different URL address, [footnote omitted] then that disclosure constitutes a separate and distinct publication – one not foreclosed by the single publication rule – and the USACE might be liable for a separate violation of the Privacy Act.*

*Oja*, 440 F.3d at 1133-34, emphasis added. With respect to the second publication, therefore, *Oja* and *Canatella* presented identical situations.

Notwithstanding the identical situations, the court distinguished *Canatella* from *Oja* by relying on a footnote in *Oja* attached to the phrase "*a different URL address*," which the court determined "makes clear that *Oja* simply uses 'URL' as a synonym for 'website.'" *Canatella* at 1134-35.

That footnote states in full:

> While Oja does not provide the public affairs website's URL listing in his Second Amended Complaint, he claims therein that this site was a second site, distinct from the national page site contemplated in his first two complaints: "This information [posted on the public affair's website] was the same information Mr. Oja had previously located on a *different* USACE website . . . but which had disappeared from that website in late November 2000." *Accordingly, we herein treat the unidentified second site as separate and distinct from the USACE's national page site. Id.* emphasis added.

*See Oja*, 440 F.3d at 1134 n.16.

The court's concession that in *Canatella* "*the first publication* [in the electronic version of the California Bar Journal] *appeared at a slightly different URL address*," *Canatella* at 1134, rendered the second publication at Petitioner's membership records website a *different* website as a matter of law, since "*Oja* . . . uses 'URL' as a synonym for 'website.'" *Canatella* at 1134-35. In sum, on the conceded facts the court should have treated the second publication at Petitioner's official member records website the same way it treated "*the unidentified second site*" in *Oja*, "as separate and distinct" from the original publication of

the defamatory statement on the California Bar Journal website.

Indeed, the defamatory statement in *Canatella* first appeared at http://www.calbar.ca.gov/calbar/2cbj/00feb/attdisc.htm in 2000, and next appeared at http://members.calbar.ca.gov/search/member_detail.aspx?X=53264) in 2004. *Canatella* at 1134 n.8. These are *by definition* two *different* URLs or website addresses. *Canatella* at 1134 ["*the first publication appeared at a slightly different URL address*"] emphasis added.[7] Therefore, Petitioner urges that treating his official member records website differently from "*the unidentified second site*" in *Oja* implicates Article III, vesting the "judicial Power" of the United States in the federal courts. U.S. Const. art. III, §§ 1, cl. 1.

---

[7] *See* Shubha Ghosh, *Gray Markets in Cyberspace*, 7 J. Intell. Prop. L. 18, n.35 (1999). "URL" stands for Universal Resource Locator, the technical term for a website address (such as http://www.calbar.ca.gov). "Navigation within the cyber-world is enabled by what essentially functions as a high-tech address system. In the cyber-world, addresses of websites are known as URLs (uniform resource locators)." G. Burgess Allison, *The Lawyer's Guide to the Internet* 60 (1995).

## II. THERE IS AN INTER-CIRCUIT CONFLICT ON THE QUESTION WHETHER ART. III IS A CONSTITUTIONAL LIMITATION ON HOW COURTS TREAT PRECEDENT.

### A. THE EIGHTH CIRCUIT CONCLUDED THAT THE DOCTRINE OF PRECEDENT LIMITS THE "JUDICIAL POWER" UNDER ART. III.

Petitioner contends that *Canatella*'s declining to follow binding precedent in *Oja* reflects an implied assertion that courts have the following power: to choose for themselves, from among all the cases they decide, those that they will follow in the future, and those that they need not. Indeed, the *Canatella* panel is saying: "We may have decided this question the opposite way yesterday in *Oja*, but this does not bind us in *Canatella* today." Such a statement exceeds the judicial power, which is based on reason, not on fiat. Accordingly, at least one circuit has concluded that the doctrine of precedent is intended to limit the "judicial power" under Art. III.

In *Anastasoff v. United States*, 223 F.3d 898, 899, vacated as moot on reh'g en banc, 235 F.3d 1054 (8th Cir. 2000), the Eighth Circuit held unconstitutional circuit rule 28A(i). That rule provided that "unpublished dispositions are not precedential – opinions are not precedent," but that they could be cited for their "persuasive value." *Anastasoff*, 223 F.3d at 899. The Eighth Circuit reasoned that the Framers of the Constitution were aware of the doctrine of precedent and intended it to "limit the judicial power delegated

to the courts by Article III." *Anastasoff,* 223 F.3d at 900. The late Judge Richard Arnold remarked that "[A] more alarming doctrine could not be promulgated by any American court, than that it was at liberty to disregard all former rules and decisions, and to decide for itself, without reference to the settled course of antecedent principles." *Anastasoff,* 223 F.3d at 904.

*Anastasoff* concluded that not only published opinions of the court but also every unpublished opinion must, as a matter of originalist constitutional interpretation, be considered as creating binding precedent. *Anastasoff*, 223 F.3d at 899-900 ("Inherent in every judicial decision is a declaration and interpretation of a general principle or rule of law. . . . This declaration of law is authoritative to the extent necessary for the decision, and must be applied in subsequent cases to similarly situated parties." (citation omitted)). This much, the court asserted, was the implicit understanding of the conferral of "judicial power" upon Article III judges at the time of the Founding. *Anastasoff,* 223 F.3d at 900 ("The Framers of the Constitution considered these principles to derive from the nature of judicial power. . . .").

Opening with powerful symbolism, Judge Arnold draws authority initially from the jurisprudence of the *Marbury* Court, which reasoned that, "[i]t is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret the rule." *Marbury v. Madison,* 5

U.S. (1 Cranch) 137, 177 (1803). This articulation of the nature of the common law process, namely, the articulation of rules and their interpretation by application in subsequent cases, is followed rapidly by an appeal to the necessity to treat like cases alike: "This . . . declaration of law . . . must be applied in subsequent cases to similarly situated parties." Anastasoff, 223 F.3d at 900. A court's "declaration of law" in each case "is authoritative to the extent necessary for the decision." *Anastasoff*, 223 F.3d at 900. Taken together, Judge Arnold opines, *"[t]hese* principles . . . form the doctrine of precedent." *Id.*

Judge Arnold's next appeal to authority is to the understanding of the Founders. Their understanding of precedent was that courts declare or articulate rules (formulae that connote the legal fiction that common law judges do not make law, but rather discern and announce previously existing legal rules) and interpret them in each application. Similarly situated litigants must be treated similarly and the interactivity of precedent is necessarily incremental. *See Anastasoff,* 223 F.3d at 899-900 (stating that "every judicial decision is a declaration and interpretation of a general principle or rule of law," which is "authoritative to the extent necessary for the decision," and "must be applied in subsequent cases to similarly situated parties").

The next step in Judge Arnold's reasoning is the claim of authority for his holding of unconstitutionality on *ultra vires* grounds, namely, that "[t]he Framers . . . considered these principles to derive from the

nature of judicial power, and intended that they would limit the judicial power delegated to the courts by Article III of the Constitution." *Anastasoff,* 223 F.3d at 900. Depending on this Court's interpretation of Article III, its text is perhaps merely descriptive, or perhaps prescriptive and pregnant with connotation. Notwithstanding its interpretation, Article III simply provides that "[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." U.S. Const. art III, §§ 1, cl. 1.

However, in a flurry of citations to authority, from Professor Morton Horwitz to Sir William Blackstone to (simultaneously) Roman, Norman, and the earliest of English Law, Judge Arnold bridges the gap between his English sources of the doctrine of precedent and its embracing by the Founders.[8] Then, citing Coke, he essays the rhetorically powerful claim that "assertion of the authority of precedent had been effective in past struggles of the English people against royal usurpations, and for the rule of law against the arbitrary power of government." *Id.* The

---

[8] *Anastasoff v. United States*, 223 F.3d 898, 900 (8th Cir. 2000) (citing Morton J. Horwitz, *The Transformation of American Law*: 1780-1860, at 8-9 (1977); J.H. Baker, *An Introduction to English Legal History* 227 (1990); Sir William Holdsworth, *Case Law*, 50 L.Q.R. 180 (1934); 1 William Blackstone, *Commentaries* *69 (1765)).

Framers thus "had inherited a very favorable view of precedent from the seventeenth century" via Coke. *Anastasoff* at 900.

Judge Arnold concludes that "the doctrine of precedent was not merely well-established [at the Nation's founding]; it was the historic method of judicial decision-making, and well-regarded as a bulwark of judicial independence in past struggles for liberty." He qualifies Coke as "the legal authority most admired and most often cited by American patriots" and impeaches the "only critic of the doctrine of precedent," Hobbes, "who regarded the authority of precedent as an affront to the absolute power of the Sovereign." *Anastasoff,* 223 F.3d at 900 n.6. He also concludes that "the judicial power is limited by [precedents]," and then makes a claim for the reception of this eighteenth century British philosophy of law by the Framers. *Anastasoff,* 223 F.3d at 901 n.9.

Judge Arnold's peroration cites the eighteenth century and the Framers, and adds the authority of Joseph Story for the proposition that "the doctrine of precedent limits the 'judicial power' delegated to the courts in Article III." *Anastasoff,* 223 F.3d at 903-04 n.14. He concludes his extensive quotation from Story noting that "'a departure from [the doctrine of precedent] would have been deemed [by the Framers] an approach to tyranny and arbitrary power, to the exercise of mere discretion, and to the abandonment

of all the just checks upon judicial authority.'"[9] There is, therefore, much to be said for Judge Arnold's rhetoric of judicial rectitude and his call for constraints on judicial power.

This discourse runs, however, dramatically counter to the discourse of the necessity of judges prospectively controlling the law announced by Judge Alex Kozinski in *Hart v. Massanari*, 266 F.3d 1155, 1174 (9th Cir. 2001) (*Hart*). Judge Arnold's rhetoric rests on the authority of English jurisprudence of the eighteenth century and that of the Framers, emphasizing both precedent's control over judicial lawmaking and the authority of the law and the people versus that of capricious monarchs or judges. Conversely, Judge Kozinski's rhetoric tells a story of modernity, of a doctrine of selectively rigid precedent that has emerged in the United States federal courts, and is distinct from common law precedent, and of judge as legislator who decides when the time has come to attempt to bind those who follow to the letter of legal rules. Judge Kozinski's discourse should not withstand the force of Article III.

---

[9] *See Anastasoff*, 223 F.3d at 903-04 (quoting Joseph Story, *Commentaries on the Constitution of the United States* §§ 377-78 (1833)).

## B. *HART*'S CALL FOR UNLIMITED JUDICIAL CONTROL OF THE LAW AND PRECEDENT SHOULD BE REJECTED.

Judge Kozinski characterizes Judge Arnold's argument about Article III as "preclud[ing] . . . federal courts from making rulings that are not binding in future cases." Judge Kozinski seems to believe that judges do not establish precedent which is contrary to what Judge Arnold states. So the issues for this Court are not only whether Article III's "judicial power" clause includes the need to apply the doctrine of precedent but also what that doctrine entails. For example, striking at Judge Arnold's careful avoidance of the claim that common law judges make rather than discover the law, Judge Kozinski parses that as meaning that "they are required to make law in every case." *Hart*, 266 F.3d at 1159-60.

Judge Kozinski then begins to articulate his own theory of precedent, one which draws on the authority of a distinctively American "modern legal system":

> . . . *Anastasoff* overstates the case. Rules that empower courts of appeal to issue nonprecedential decisions do not cut those courts free from all legal rules and precedents; . . . such rules have a much more limited effect: They allow panels of the courts of appeals to determine whether future panels, as well as judges of inferior courts of the circuit, will be bound by particular rulings. This is hardly the same as turning our back on all precedents, or on the concept of precedent altogether.

*Hart*, 266 F.3d at 1160.

Judge Kozinski emphasizes that "the concept of binding case precedent, though it was known at common law, was used exceedingly sparingly" at the time Article III of the Constitution was drafted. *Hart*, 266 F.3d at 1175 (internal citation omitted). Overall, Judge Kozinski conceives of "the principle of strict binding authority" as "a matter of judicial policy," rather than a constitutional issue. *Hart*, 266 F.3d at 1175.

Judge Kozinski then takes head-on Judge Arnold's claim that Article III judicial power is subject to an implied constitutional limitation which allows courts to declare some of their decisions nonprecedential.[10] Interspersed with this portion of Judge Kozinski's argument is an appeal to the exigencies of practicality and modernity,[11] and to the way in which the United States federal courts have come to "do business."[12] This appeal is coupled with the claim that "much of what the federal courts do could be modified or eliminated without offending the Constitution." *See Hart*, 266 F.3d at 1162.

---

[10] *See Hart*, 266 F.3d at 1160-1162 nn.4-5 (arguing that Article III does not limit the power of courts to issue nonprecedential opinions).

[11] *See Hart*, 266 F.3d at 1160-1162 (enumerating the common practices of modern courts that differ from earlier courts).

[12] *See Hart*, 266 F.3d at 1161 (citing Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 Harv. L. Rev. 1362, 1363-64 (1953)).

Judge Kozinski then proceeds to caution against "freez[ing] the law into the mold cast in the eighteenth century." *Hart*, 266 F.3d at 1162. He catalogues and criticizes eighteenth century U.S. judicial practices that have fallen into disuse,[13] and in doing so calls into question the accuracy of Judge Arnold's account of the doctrine of precedent at the time of the Framers.[14]

Judge Kozinski then effectively accuses Judge Arnold of intellectual bad faith in "pick[ing] and choos[ing] those ancient practices [he] find[s] salutary as a matter of policy, and give[s] them constitutional status." *Id.* at 1163. In a revealing aside, as this first criticism is introduced, Judge Kozinski introduces a theme that recurs in the opinion: the virtues of judicial opinions speaking monologically, with one authoritative voice that is resistant to future interpretivity.[15]

Judge Kozinski then embarks on an elaborate exposition of the differences between precedent at the time of the Framers and precedent in the modern

---

[13] *See Hart*, 266 F.3d at 1161 (noting changes in the law since the eighteenth century).

[14] *See Hart*, 266 F.3d at 1162 n.6 (discussing the question of what weight was given to precedent at the time of the Framing).

[15] *See Hart*, 266 F.3d at 1163 n.6 (opining that "[n]ine judges speaking separately may well agree on the outcome of a case, but they cannot give the kind of specific guidance as to the conduct of future cases that can be found in a single opinion speaking for the court").

federal courts. The proposition that the "overwhelming consensus in the legal community has been that having appellate courts issue nonprecedential decisions is not inconsistent with the exercise of the judicial power," *Hart*, 266 F.3d at 1163, is made revealingly without citation to authority. He goes on to claim both that contemporary conceptions of precedent are "stricter" than those of the Framers and that, in any event, the reason that there is no "express prohibition against issuing nonprecedential opinions [is that] . . . the Framers would have seen nothing wrong with the practice." *Id.*

It is apparent that Judge Kozinski's almost civilist understanding of various texts and pedagogical practices as authoritative, and those of judges as generally not, informs his theory of precedent which becomes more visible when he is unable to differentiate methodologically between a court's generation of binding and persuasive precedent.[16] What differentiates the United States federal courts' precedential system from that of the common law,[17] as Judge Kozinski views it, is that the former binds the future, the latter is bound to follow the past. This aspect

---

[16] *See Hart*, 266 F.3d at 1172 (stating that "controlling authority has much in common with persuasive authority").

[17] *See Hart*, 266 F.3d at 1165 n.13 (noting the persuasive nature of common law decisions).

of Judge Kozinski's "habitus"[18] becomes increasingly visible as he moves to the heart of his revisionist doctrine of United States precedent.

Judge Kozinski's discourse about the Framers' attitude towards judicial officers, however, differs sharply from Judge Arnold's discourse. It replaces one on being ruled by law and protecting citizens against the excesses of the ruler, with one about government officers whose power was the subject of "contestation."[19] The flexibility, originating in its derivation from custom, of English common law, suggests that Judge Kozinski's and thus modernity's theory of precedent is more rigid than that of the Framers.[20] It also leads into the "modern" view that judges make rather than discover the law.[21] This combination of the acknowledgment that judges make law and the emergence of opinion reporting is cited as the grounds for the emergence of judicial opinions as "binding precedent." *Hart*, 266 F.3d at 1168.

---

[18] See Pierre Bourdieu, *The Logic of Practice* 53, n.17 (defining *habitus* as a system of structured, structuring dispositions).

[19] *See Hart*, 266 F.3d 1155, 1167 n.20 (9th Cir. 2001) (stating that at time of the Framing, the concept of precedent was subject to debate).

[20] *See Hart*, 266 F.3d at 1167 (stating that common law "was a reflection of custom, and custom had built-in flexibility").

[21] *See Hart*, 266 F.3d at 1168 (stating that lawyers "began to believe that judges made, not found, the law").

Judge Kozinski then begins to differentiate the common law from the system of precedent that operates in the contemporary United States federal courts.[22] He does this in part by emphasizing the hierarchical system of precedent that operates in federal courts,[23] and in part by explicitly articulating an argument central to his discourse on precedent. Binding authority – "very powerful medicine"[24] – must be crafted using "precise language,"[25] via a process of "collegial"[26] so that the court speaks with one voice, rather than admitting of dissent – or dialogue.

Judge Kozinski then pairs an argument about the disorder that would ensue if the federal courts' system of differentiating binding and persuasive precedent was abandoned with an insistence on his view that this system is merely a matter of policy

---

[22] *See Hart*, 266 F.3d at 1165 n.13 (claiming that at common law, binding precedent was only created by the Exchequer Chamber, and that circuit judges regularly decided cases without referring to reporters).

[23] *See Hart*, 266 F.3d at 1170-73 (explaining that Supreme Court opinions serve as binding precedent for all federal courts, and circuit courts must follow previous decisions within the circuit, unless overruled by the Supreme Court or the circuit in an en banc ruling, but that the circuit courts are not bound by the decisions of other circuits).

[24] *Hart*, 266 F.3d at 1171.

[25] *Hart*, 266 F.3d at 1171.

[26] *Hart*, 266 F.3d at 1171 n.26.

choice and not a constitutional matter.[27] The crux of these paired arguments is that if Article III courts must constitutionally follow precedent, rather than determine which opinions are precedential and which are not as a matter of policy, then this would apply to the federal district courts. On Judge Kozinski's account, those courts do not have the power to issue binding precedent (as a matter of policy choice).

Judge Kozinski's claim that binding precedent is a creation of the United States federal courts that postdates both Article III and English common law opens with the paradoxical statement (at least in the context of this case) that while "the principle of precedent was well established in the common law courts . . . *we do not agree that it was known and applied in the strict sense in which we apply binding authority today.*"[28] Moving on to complicate this discourse in articulating his case for selective rather than strict binding precedent, Judge Kozinski cannot logically square a claim for the necessity for "binding precedent" of any stripe with a system where judges can effectively do whatever they like, to whomever

---

[27] *See Hart*, 266 F.3d at 1174, 1176 n.30 (stating that courts would operate much less efficiently if not required to follow binding authority, and noting that in California "court of appeal panels are not bound by the opinions of other panels, even those within the same district").

[28] *See Hart*, 266 F.3d at 1174-75 (stating that binding precedent did not play the same role in common law courts, or courts at the time the Constitution was written, as it does today).

they like, whenever they feel like it, because only they have the power to say what counts as precedent and what does not!

Finally, this approach to the doctrine of precedent forces our focus on what is valued in the Art. III discourse, the *authority* of the individual court. Indeed, it is often the power of the individual judge, given the power of the drafter, on Judge Kozinski's account, to constrain future interpretability and achieve the univocality of a published "single opinion speaking for the court" that he privileges.[29] But this power may often be cynically bargained for or the product of forced consensus.[30]

## CONCLUSION

The issue this Court should decide is whether the "judicial power" clause of Article III encompasses, as envisaged at common law, an adherence to the doctrine of precedent. Stated differently, when the Ninth Circuit held that, "We may have decided this question the opposite way in *Oja*, but this does not bind us today in petitioner's case," that holding was unconstitutional and violated Article III. Petitioner urges that there is an absence of constitutional power in the

[29] *Hart*, 266 F.3d at 1162 n.6.

[30] *See, e.g.*, Penelope Pether, *Inequitable Injunctions: The Scandal of Private Judging in the U.S. Courts*, 56 Stan. L. Rev. 1435, 1450, 1487 (2004) (noting that some judges agree not to dissent in a case as long as the opinion is not published).

federal appeals courts to choose for themselves, from among all the cases they decide, those that they will follow in the future, and those that they need not.

This case confronts the Court with two viewpoints at opposite ends of the spectrum by two learned judges from two different circuits. It also presents two different decisions from the Ninth Circuit with opposite results to the same question. Such a situation cries for correction to avoid the structural subordination problems that follow the present system of institutionalized depublication, and most obviously, arbitrariness on the part of the Ninth Circuit Court of Appeals and its various collateral costs – those which derive from disrespect for the judiciary, the courts, and the law.

Because the United States federal courts, like their common law predecessors, follow a system of precedent that depends in part on court hierarchy and a differentiation between trial and appellate jurisdiction and function, the extent to which federal district court judges would have a disruptive law – divining, – declaring, or – making function (depending on one's view of how common law decisionmaking characteristically operates) seems extremely limited. For the foregoing reasons the Writ should be granted.

Respectfully submitted,

Dated: October 1, 2007

COTTER & DEL CARLO
RICHARD A. CANATELLA

**FOR PUBLICATION**

**UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

RICHARD A. CANATELLA,

*Plaintiff-Appellant,*

v.

JOHN K. VAN DE KAMP; MARIE M. MOFFAT; JAY GOLDMAN; NANCY MCCARTHY; CALIFORNIA BAR JOURNAL; ROBERT HAWLEY; ZANASSI; MARTHA DAETWYLER,

*Defendants-Appellees.*

No. 06-15186

D.C. No. CV-05-02415-BZ

OPINION

Appeal from the United States District Court for the Northern District of California
Bernard Zimmerman, Magistrate, Presiding

Argued and Submitted
October 16, 2006 – San Francisco, California

Filed May 3, 2007

Before: J. Clifford Wallace and Jay S. Bybee, Circuit Judges, and Dean D. Pregerson,* District Judge.

Opinion by Judge Bybee

---

* The Honorable Dean D. Pregerson, United States District Judge for the Central District of California, sitting by designation.

## SUMMARY

---

### Individual Rights/Civil Rights

The court of appeals affirmed a judgment of the district court. The court held that California's single publication rule applied to bar civil rights claims arising under 42 U.S.C. § 1983 on statute of limitations grounds.

In 2005, appellant Richard Canatella, a lawyer who had been disciplined by appellee the State Bar of California, filed a civil rights suit in district court in California pursuant to § 1983, claiming that when appellee Martha Daetwyler – an opposing attorney in a 2004 state probate case – cited a disciplinary summary that appeared on Canatella's member search page on the California Bar's website, she and the California Bar violated his constitutional rights. The California Bar had published a summary of Canatella's disciplinary sanctions both in print and online in 2000; Canatella conceded that he had read the print version of the summary. In 2003, the same disciplinary summary that appeared in the California Bar's online publication also appeared in response to a member search for Canatella's name, at a slightly different URL address. Daetwyler and the California Bar contended that Canatella's claims were barred by the statute of limitations, as they arose when the disputed summary first appeared on the California Bar's website in 2000. Canatella contended that his claims did not arise until 2004, when Daetwyler cited his disciplinary summary. Relying on the single

publication rule, the district court ruled that Canatella's claim arose in 2000 when the summary first appeared online.

Canatella appealed.

For actions under § 1983, courts apply the forum state's statute of limitations for personal injury actions, along with the forum state's law regarding tolling, including equitable tolling, except to the extent any of these laws is inconsistent with federal law. Thus, California's statute of limitations for assault, battery, and other personal injury claims applied to Canatella's § 1983 claims unless it was inconsistent with federal law. The current version of that statute, which became effective on January 1, 2003, provides that personal injury actions must be brought within two years after the cause of action arose. Because that statute does not apply retroactively, any cause of action that was more than one-year old as of January 1, 2003, would be barred under the previous one-year statute of limitations. Under California's single publication rule, with respect to the statute of limitations, publication generally is said to occur on the first general distribution of the publication to the public, meaning that a cause of action accrues and the period of limitations commences, regardless of when the plaintiff secured a copy or became aware of the publication.

Because federal law determines when a civil rights claim accrues, California's single publication rule did not apply to Canatella's claims by its own

force. Instead, under federal law, a claim accrues when the plaintiff knows or has reason to know of the injury which is the basis of the action. In applying that principle, however, the court of appeals has employed the single publication rule's logic to hold that once that standard is met, a single publication gives rise to only one cause of action. The application of the single publication rule to Internet publication was not inconsistent with federal law because that rule focuses a plaintiff's claims against a defendant, thereby economizing judicial resources while preserving the plaintiff's ability to bring the claims. Applying that principle, Canatella's civil rights claims were barred by California's one-year statute of limitations. Canatella saw the summary in the California Bar's print publication in 2000, and that publication informed – or should have informed – him that the same summary appeared on the Internet website. Because, under the single publication rule, a single publication gives rise to only one cause of action, the statute of limitations period began to run on all of Canatella's claims in 2000, and that period expired long before January 1, 2003. Thus, the district court properly concluded that Canatella's 2005 complaint was untimely.

The California Bar's decision to add the disciplinary summary to Canatella's member search page did not trigger a new cause of action since a verbatim copy of that summary had appeared on the exact same website since 2000. The California Bar's posting of his disciplinary record in a different section of the

same website did not give rise to a new cause of action, and accordingly, the statute of limitations period expired long before Canatella brought suit in 2005. In any event, the court of appeals would be compelled to hold that a website – not a particular URL – is the touchstone for the single publication rule analysis because of the very interests the single publication rule is designed to promote.

A new cause of action did not arise in 2004 when Daetwyler repeated the summary to third persons. Daetwyler's decision to use the statements contained on the Internet was more like a mere continuing impact from alleged past violations that is not actionable as a new cause of action, and as such, it could not give rise to a new cause of action. As Canatella could bring only one cause of action arising from the publication of his disciplinary summary in any single source, and the statute of limitations ran on that claim before he filed his complaint, the district court's dismissal order had to be affirmed.

---

## COUNSEL

Richard A. Canatella, Esq., and Ronald Toran, Esq., Cotter & Del Carlo, San Francisco, California, for the plaintiff-appellant.

R. Scott Erlewine, Esq., Phillips, Erlewine, & Given LLP, San Francisco, California, for defendants-appellees.

---

## OPINION

BYBEE, Circuit Judge:

Appellant Richard Canatella ("Canatella") appeals the United States District Court's order dismissing his civil rights suit against the State Bar of California ("California Bar"), several officers of the California Bar (collectively, with the California Bar, "Appellees"), and attorney Martha Daetwyler ("Daetwyler"). The district court disposed of Canatella's civil rights claims against Appellees on statute of limitations grounds and Canatella's claims against Daetwyler on state action and privilege grounds. We now deal with Canatella's claims against Appellees[1] and affirm the district court's dismissal order.

### I

Canatella is a California attorney, who has been repeatedly sanctioned by both state and federal courts.[2] At some point after 1992, the California Bar initiated disciplinary proceedings against Canatella in connection with those sanctions. Canatella challenged those proceedings in federal court, but his suit

---

[1] We deal with Canatella's claims against Daetwyler in an unpublished memorandum disposition.

[2] Though there is some dispute over how many times Canatella has been sanctioned, Canatella's second amended complaint concedes that he has been "investigated for forty-seven (47) purported sanction orders over a nine year period" and has been sanctioned at least "twenty-six (26) separate times between 1989 and 1998, by federal and state courts."

was dismissed on abstention grounds. After that dismissal, Canatella and the California Bar reached an agreement concerning his professional conduct, and as part of that agreement, Canatella consented to a thirty-day suspension of his license and a probationary period of eighteen-months. When the California Supreme Court approved that agreement in August 1999, the sanction and suspension became part of Canatella's public disciplinary record. *See* CAL. BUS. & PROF. CODE § 6086.1(a)(1) (providing that "records of original disciplinary proceedings in the State Bar Court shall be public").

Thereafter, in February 2000, pursuant to California law, the *California Bar Journal* published an identical summary of Canatella's disciplinary sanction in both its paper and online editions.[3] That summary, which Canatella concedes he read in the print version of the *California Bar Journal,* read as follows:

> RICHARD A. CANATELLA [#53264], 61, of San Francisco was suspended for 18 months, stayed, placed on 18 months of probation with a 30-day actual suspension, and was ordered to take the MPRE within one year. The order took effect Sept. 17, 1999.
>
> Canatella stipulated to filing numerous frivolous actions in courts in San Mateo, San

[3] The California Bar has been publishing the *California Bar Journal* in both paper and electronic form since January 1996.

Francisco, and Santa Clara county courts, as well as in the California Court of Appeal and federal district and appeals courts.

Six were civil matters he filed relating to a criminal case in which he represented a babysitter who was convicted of second degree murder and felony child abuse. The civil cases, filed on behalf of the babysitter and her parents, who owned the house where she lived, included legal malpractice, insurance bad faith, and allegations that various defendants conspired to deprive his clients of their constitutional rights.

Canatella's involvement in nine other matters also was the subject of discipline.

Sanctions were ordered against him or his clients 37 times. Courts repeatedly found him responsible for frivolous, meritless and vexatious actions. Sanctions totaled more than $18,000 in one matter, and the opposing parties were granted all fees and costs in another.

In one case, a federal judge said, "This complaint is a paradigm for 'frivolous.' "Wrote another federal jurist: "Plaintiff's repeated attempt to challenge the sanctions and judgments . . . in the face of clear authority that his claim is frivolous evidences his bad faith and wrongful purpose."

In mitigation, Canatella has no record of discipline since beginning to practice law in 1972 and he demonstrated his good character by

> presenting testimonials from eight people, including four attorneys and three judges. He also presented a lengthy list of his professional accomplishments.

In addition to containing an electronic version of the *California Bar Journal,* the California Bar's website also contains a member search function that allows the public to search for information on California attorneys. Before 2003, if a member had a disciplinary record, a member search would only reveal the existence – but not the content – of that record. At some point after March 2003, however, that same search would reveal both the existence of a disciplinary record and the *California Bar Journal's* summary of that record.[4] Consequently, at some point after August 2003,[5] the same disciplinary summary that appeared in the online *California Bar Journal* also appeared in response to a member search for Canatella's name.

---

[4] The California Bar's website includes summaries of disciplinary proceedings that occurred after 1996.

[5] The California Bar began including disciplinary summaries on member search pages in March 2003. Nevertheless, an uncontradicted affidavit from an employee of Canatella's firm – the truth of which we assume for purposes of this appeal – states that the employee could not locate the summary when he ran a member search for Canatella's name between October 2002 and August 2003. The Appellees also concede that "[they] do not know the specific date" that Canatella's summary first appeared in response to a member search.

On July 27, 2004, Daetwyler – who represented a client adverse to Canatella's in a state probate proceeding – cited the disciplinary summary that appears on Canatella's member search page in support of a motion to recover court costs. Though the probate court denied that motion, Canatella filed this suit pursuant to 42 U.S.C. § 1983, in July 2005, claiming that when Daetwyler cited that record she and Appellees violated his First, Fourth, and Fourteenth Amendment rights.[6] As part of his prayer for relief, Canatella sought both damages and "[d]eclaratory or injunctive relief enjoining the [Appellees] from republishing the offending summary on the [California] Bar['s] internet web site [sic], and directing [Appellees] to remove the offending summary."

---

[6] Canatella's second amended complaint makes five claims. First, Canatella contends that a summary of his disciplinary record that appears on the California Bar's website violates his "constitutional right to privacy as a licensed attorney in good standing[ ] and infringes his right to confidentiality and autonomy." Next, Canatella contends that by making his disciplinary summary available in response to a member search without giving him a chance to review that summary, Appellees violated his procedural due process rights. Third, Canatella contends that the posting constitutes a "prior restraint prohibited by the First Amendment." Fourth, Canatella maintains that the posting violates substantive due process because it was posted "pursuant to a conspiracy designed to destroy [his] reputation and ability to . . . mak[e] a living and . . . continu[e to] . . . practice . . . law." And finally, Canatella maintains that the posting violates the Equal Protection Clause because the California Bar only posts the records of disciplinary proceedings occurring after 1996 on its website.

Thereafter, Daetwyler and Appellees filed motions to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). The district court granted Daetwyler's motion, and at the same time, when "it became apparent that" Canatella's claims against Appellees might be barred by the statute of limitations, the district court "as permitted by [Federal] Rule [of Civil Procedure] 12(b)(6) . . . gave the parties an opportunity to take limited discovery on [that] issue and to submit matters outside the pleadings to see if [that] potentially dispositive issue could be resolved at the outset." Based on information obtained in that manner, the district court granted Appellees' motion to dismiss. Canatella appeals that dismissal.

## II

### A

Canatella filed suit against Appellees pursuant to 42 U.S.C. § 1983, which provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

Canatella challenges the district court's decision granting Appellees' motion to dismiss his claims pursuant to Rule 12(b). Because limited "matters outside the pleading[s] [were] presented to" the district court in ruling on that motion, Canatella's "motion [is] treated as one for summary judgment and disposed of as provided in Rule 56." FED. R. CIV. P. 12(b). We review such rulings de novo. *Orr v. Bank of Am.*, 285 F.3d 764, 772 (9th Cir. 2002). In so doing, "[w]e must determine, viewing the evidence in the light most favorable to the nonmoving party and drawing all justifiable inferences in its favor, whether there are any genuine issues of material fact and whether the moving party is entitled to judgment as a matter of law." *Id.*; *accord Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Furthermore, "[a] district court's decision as to whether a claim is barred by the statute of limitations is reviewed de novo," *Santa Maria v. Pac. Bell*, 202 F.3d 1170, 1175 (9th Cir. 2000), as is the question of when "the statute of limitations begins to run," *Orr*, 285 F.3d at 780. Applying that standard, we affirm the district court's decision because under California law, the statute of limitations ran on Canatella's claims before he filed his complaint.[7]

"For actions under 42 U.S.C. § 1983," like Canatella's, "courts apply the forum state's statute of

---

[7] Because the statute of limitations issue is dispositive, we assume – for the purposes of this appeal – that Canatella has otherwise stated a valid § 1983 claim.

limitations for personal injury actions, along with the forum state's law regarding tolling, including equitable tolling, except to the extent any of these laws is inconsistent with federal law." *Jones v. Blanas,* 393 F.3d 918, 927 (9th Cir. 2004), *cert. denied,* 126 S. Ct. 351 (2005). Thus, "California['s] statute of limitations for assault, battery, and other personal injury claims" applies to Canatella's § 1983 claims unless it is inconsistent with federal law. *Id.* The current version of that statute, which became effective on January 1, 2003, provides that personal injury actions must be brought within two years after the cause of action arose. *See Maldonado v. Harris,* 370 F.3d 945, 954-55 (9th Cir. 2004); *see also* CAL. CIV. PROC. CODE § 335.1. Because that statute does not apply retroactively, any cause of action that was more than one-year old as of January 1, 2003 would be barred under the previous one-year statute of limitations. *Jones,* 393 F.3d at 927 & n.4; *see also Maldonado,* 370 F.3d at 954-55.

The parties dispute when Canatella's claims arose, and that dispute is relevant to determining whether California's previous one-year statute of limitations or the newly enacted two-year limitation period applies to Canatella's claim. Canatella contends that his claims did not arise until July 27, 2004, when Daetwyler cited his disciplinary summary. If Canatella is correct, the new two-year statute of limitations applies and Canatella's July 15, 2005 complaint would have been timely. By contrast, Appellees contend that Canatella's claims arose when the disputed summary first appeared on the California Bar's

website in the electronic version of the California Bar Journal in February 2000. To support that argument, Appellees argue that the single publication rule, as codified in California at Civil Code § 3425.3, applies to Canatella's claims, and under that "rule, with respect to the statute of limitations, publication generally is said to occur on the first general distribution of the publication to the public," meaning that a "cause of action accrues and the period of limitations commences, *regardless* of when the plaintiff secured a copy or became aware of the publication." *Shively v. Bozanich,* 80 P.3d 676, 684 (Cal. 2003) (internal quotation marks omitted); *see also* RESTATEMENT (SECOND) OF TORTS § 577A(4) (1977) ("As to any single publication, (a) only one action for damages can be maintained; (b) all damages suffered in all jurisdictions can be recovered in the one action; and (c) a judgment for or against the plaintiff upon the merits of any action for damages bars any other action for damages between the same parties in all jurisdictions."). If Appellees are correct, the old one-year limitations period bars Canatella's claims, as his complaint must have been filed no later than February 2001. Relying on the single publication rule's logic, the district court held that Canatella's claim arose in February 2000 when the summary first appeared in the online version of the *California Bar Journal.*

Because federal – not state – "law determines when a civil rights claim accrues," *Maldonado,* 370 F.3d at 955, California's single publication rule does

not apply to Canatella's claims by its own force. Instead, "[u]nder federal law, a claim accrues when the plaintiff knows or has reason to know of the injury which is the basis of the action." *TwoRivers v. Lewis,* 174 F.3d 987, 991 (9th Cir. 1999). In applying that principle, however, we have employed the single publication rule's logic to hold that once that standard is met, a single publication gives rise to only one cause of action. In *Oja v. United States Army Corps of Eng'rs,* 440 F.3d 1122, 1128, 1130-33 (9th Cir. 2006), for instance, we applied the single publication rule to a plaintiff's claim that the Corps of Engineers had violated the Privacy Act by posting the plaintiff's employment information on the internet. *Oja* held that the plaintiff's claims were barred by the Privacy Act's two-year statute of limitations since the first posting had occurred more than two years before the plaintiff brought suit and the plaintiff conceded that he had seen that posting more than two years before he filed suit. *Id.* at 1125, 1133. In so doing, we also held – as we do now – that the "[a]pplication of the single publication rule to Internet publication was not inconsistent with" federal law because that rule focuses a plaintiff's "claims against a defendant, thereby economizing judicial resources while preserving the plaintiff's ability to bring the claims." *Id.* at 1133. Other circuits have applied the single publication rule's logic in a similar manner. *See, e.g., Pitts v. City of Kankakee,* 267 F.3d 592, 596-97 (7th Cir. 2001) (applying the single publication rule's logic to hold that a defamation claim arising under § 1983 was barred on statute of limitations grounds).

B

Applying that principle, Canatella's civil rights claims are barred by California's one-year statute of limitations. Canatella saw the summary he now complains of in the print version of the *California Bar Journal* in February 2000, and that publication informed – or should have informed – him that the same summary appeared on the internet website per the California Bar's previously stated policy to post an electronic version of the *California Bar Journal* on its website. Because, under the single publication rule, a single publication gives rise to only one cause of action, the statute of limitations period began to run on *all* of Canatella's claims in February 2000, and that period expired long before January 1, 2003. Thus, the district court properly concluded that Canatella's 2005 complaint was untimely.

Canatella attempts to avoid that conclusion on three grounds: First, he argues that by posting his disciplinary record at a second place on the California Bar's website, the California Bar republished his disciplinary record and restarted the statute of limitations period. Second, Canatella argues that Daetwyler's citation of his disciplinary record similarly constituted republication. And third, Canatella claims that every time a person searches for and locates the allegedly offensive summary a new cause of action accrues. All three contentions are without merit.

Canatella's first argument – that placing his disciplinary summary on his member search page

constituted a separate publication – is foreclosed by *Oja*. In that case, the plaintiff alleged, *inter alia*, that the Corps of Engineers had published private employment information in violation of federal law on two distinct websites thereby giving rise to two separate causes of action. *Oja*, 440 F.3d at 1133-34. We agreed, holding that if the Corps of Engineers had "published the same private information" that it had previously published "at a different URL address, then that disclosure [would] constitute [] a separate and distinct publication – one not foreclosed by the single publication rule – and the [Corps of Engineers] might be liable for a separate violation of the Privacy Act." *Id.* (footnote omitted). Whereas at first glance that language might appear to support Canatella's claim that his cause of action is not barred by the single publication rule since the first publication appeared at a slightly different URL address,[8] a footnote attached to the phrase "a different URL address" makes clear that *Oja* simply uses "URL" as a synonym for "website." *See id.* at 1134 n.16. Indeed, that footnote reveals that the *Oja* plaintiff did not even "provide the [second] website's URL listing in

[8] The summary was first posted at http://www.calbar.ca.gov/calbar/2cbj/00feb/attdisc.htm and later posted at http://members.calbar.ca.gov/search/member_detail.aspx?X=53264. Though at oral argument, Appellees seemed to indicate that both addresses originally contained the identifier calbar.org instead of calbar.ca.gov, this difference is immaterial since users accessing calbar.org are automatically transferred to calbar.ca.gov. Moreover, Canatella does not rest his argument on this distinction.

his Second Amended Complaint" and simply alleged that a second publication had occurred on "a second site, distinct from the [first]." *Id.*; *accord id.*(noting that the plaintiff had alleged that the second publication had occurred on a "*different* [Corps of Engineers] website" (emphasis added)). Accordingly, we "treat[ed] the . . . second site as separate and distinct from the [first] site" and held – on that basis – that the plaintiff's claims based on the second publication were not barred by the single publication rule. *Id.* at 1133-34 & n.16. Applying *Oja's* mode of analysis, the California Bar's decision to add the allegedly offensive disciplinary summary to Canatella's member search page did not trigger a new cause of action since a verbatim copy of that summary had appeared on the *exact* same website since February 2000. Thus, contrary to Canatella's claims, the California Bar's posting of his disciplinary record in a different section of the same website did not give rise to a new cause of action under *Oja,* and accordingly, the statute of limitations period expired long before Canatella brought suit in 2005.

Even aside from *Oja,* however, we would be compelled to reject Canatella's contention and hold that a website – not a particular URL – is the touchstone for the single publication rule analysis because of the very interests the single publication rule is designed to promote. For instance, as other courts have noted, the single publication rule exists to "reduce[] the possibility of hardship to plaintiffs [and defendants] by allowing the collection of all damages

in one case commenced in a single jurisdiction" and prevent "a multiplicity of actions, leading to potential harassment and excessive liability, and draining of judicial resources." *Firth v. State,* 98 N.Y.2d 365, 369-70, 775 N.E.2d 463, 465 (N.Y. 2002); *Traditional Cat Ass'n, Inc. v. Gilbreath,* 118 Cal. App. 4th 392, 403-04 (Cal. Ct. App. 2004). Such interests, however, would hardly be promoted by a rule permitting a new cause of action to arise every time a few characters – due to the continually evolving nature of technology – in a URL address changes, even though the same allegedly defamatory statement continued to appear on the same website.

We also reject Canatella's second contention that a new cause of action arose on July 27, 2004 when "Daetwyler . . . and others . . . repeat[ed] or republish[ed] the false and misleading summary to third persons" because Appellees knew or should have known that Daetwyler would use Canatella's disciplinary summary. In support of this claim, Canatella cites *Schneider v. United Airlines, Inc.,* 208 Cal. App. 3d 71, 75-78 (Cal. Ct. App. 1989), which held that United Airlines and another company could be held liable for the republication of an allegedly defamatory statement made by those companies to a credit reporting agency that then passed the information on to others. In so holding, *Schneider* rejected the argument that the single publication rule should bar such republication claims because the repetition was "foreseeable" and there was a "strong causal link between the actions of the originator and the damage

caused by the republication." *Id.* at 75-76. At first glance, *Schneider* might appear to support Canatella's argument since Daetwyler cited Canatella's disciplinary record. That case is distinguishable, however, because whereas *Schneider* involved giving information to an agency *charged with republishing* that information in response to specific inquiries, Appellees merely posted the allegedly offensive statement on a public website. Therefore, unlike the defendants in *Schneider* who made an offensive statement to an agency that they knew would report the information to others, Appellees had no similar foresight that Daetwyler would communicate the information posted on the internet. Moreover, far from constituting a republication, Appellee Daetwyler's decision to use the statements contained on the internet is more like the "mere continuing *impact* from [alleged] past violations [that] is not actionable" as a new cause of action, *Knox v. Davis,* 260 F.3d 1009, 1013 (9th Cir. 2001) (internal quotation marks omitted), and as such, it cannot give rise to a new cause of action.

Finally, Canatella's third argument – that the single publication rule should not apply because his disciplinary record is provided in response to specific inquiries – is similarly flawed. In support of that argument, Canatella relies on *Swafford v. Memphis Individual Practice Ass'n,* 1998 WL 281935 (Tenn. Ct. App. Jun. 2, 1998), an unpublished state court opinion, which we have interpreted as holding that the single publication rule does not apply to a situation

where "a *certified* entity *directly request[s]* [allegedly defamatory] information from [an] electronic databank held by the [defendant], [and] the [defendant] provide[s] the information directly to the requesting entity." *Oja,* 440 F.3d at 1133 (explaining *Swafford,* 1998 WL 281935, at *8) (emphasis in original). As we have previously observed, "*Swafford* is distinguishable from . . . and is not inconsistent with the application of the single publication rule to the vast majority of Internet publication[ ]" cases because "the information at issue in *Swafford* was not available for the general public to access, nor could any unregistered and non-specific entities access the registered databank," rather "*Swafford* is much more akin to the release of personal credit reports." *Id.* Therefore, even assuming, as Canatella argues, that a member search for his disciplinary record is a specific inquiry like in *Swafford,* Canatella's reliance on *Swafford* is misplaced because his disciplinary record has consistently been *generally available.* Accordingly, we reject Canatella's third contention.

Consequently, as Canatella may only bring one cause of action arising from the publication of his disciplinary summary in any single source and the statute of limitations ran on that claim before he filed his complaint, we affirm the district court's dismissal order.

## III

For the reasons set forth above, the district court's order dismissing Canatella's § 1983 claims against Appellees is **AFFIRMED.**

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

| | | |
|---|---|---|
| RICHARD A. CANATELLA,<br>Plaintiff(s),<br>v.<br>JOHN VAN DE KAMP, ESQ., et al.,<br>Defendant(s). | ) | No. C05-2415 BZ<br>**ORDER GRANTING DEFENDANTS' MOTION TO DISMISS** |

Plaintiff Richard Canatella filed this action on June 15, 2005 against the State Bar of California (erroneously sued as the California Bar Journal (the "Bar Journal")) and several officers of the State Bar,[1] alleging defendants violated plaintiff's First, Fourth and Fourteenth Amendment rights.[2] Defendants filed a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) on several grounds, including that plaintiff's federal claims are time barred.

The essence of plaintiff's complaint is that defendants violated his civil rights when they published a summary of plaintiff's discipline record (the summary) on the State Bar's website.

---

[1] Defendant Martha L. Daetwyler, Esq. was also named in plaintiff's complaint. The Court granted Daetwyler's motion to dismiss on December 13, 2005.

[2] All parties have consented to my jurisdiction pursuant to 28 U.S.C. § 636(c).

In their motion, defendants argue that because the summary was published on their website in February 2000, plaintiff's complaint, filed June 15, 2005, is time barred. Plaintiff argues that the statute of limitations did not begin to run until July 17, 2004, when former defendant Martha Daetwyler cited the summary in a court proceeding.

California personal injury law provides the statute of limitations for plaintiff's § 1983 claim. *Jones v. Blanas,* 393 F.3d 918 (9th Cir. 2004). The current statute of limitations is two years. Cal. Civ. P. Code § 335.1. Defendants argue that the former one-year statute of limitations should apply.[3] The more difficult question is when plaintiff's claim accrued. Assuming that plaintiff states a federal civil rights claim,[4] accrual is governed by federal law.[5]

---

[3] As discussed below, plaintiff's claim accrued in February 2000. The statute of limitations was then one year. Because extending the statute on January 1, 2003 did not revive claims which had already expired, plaintiff's claim is governed by the previous one-year statute. *Maldonado v. Harris,* 370 F.3d 945, 954-5 (9th Cir. 2004).

[4] It is difficult to understand how a summary of discipline to which plaintiff stipulated, which was unobjectionable when published in print, somehow violates plaintiff's civil rights when it is posted on the State Bar's website. Nevertheless, for purposes of this ruling, the Court assumes that plaintiff has stated a civil rights claim.

[5] Under state law, the Uniform Single Publication Act limits plaintiff to one cause of action for damages founded on any single publication, and the statute of limitations period runs from the first instance of publication. Cal. Civ. Code § 3425.3; *see also Cusano v. Klein,* 264 F.3d 936, 949 (9th Cir. 2001)

(Continued on following page)

*Maldonado v. Harris,* 370 F.3d 945, 955 (9th Cir. 2004). "Under federal law, a claim accrues when the plaintiff knows or has reason to know of the injury which is the basis of the action." *Id.* (quoting *TwoRivers v. Lewis,* 174 F.3d 987, 992 (9th Cir. 1999)).

Plaintiff first challenges the date on which the summary appeared on the State Bar's website. At a hearing on October 12, 2005, it became apparent that this threshold issue could not be determined from the face of the complaint or from any matter of which I could take judicial notice. Accordingly, as permitted by Rule 12(b)(6), I gave the parties an opportunity to take limited discovery on this issue and to submit matters outside the pleadings to see if this potentially dispositive issue could be resolved at the outset of the litigation. I otherwise stayed the litigation.

Defendants submitted additional declarations from Nancy McCarthy, the Editor and General Manager of the Bar Journal and its Senior Writer from March 1991 to November 2000, which establish that the summary appeared on the State Bar's website in February 2000 (McCarthy Decl. dated October 19, 2005, ¶ 2). In her declarations, McCarthy explains the Bar Journal's practice of posting the Bar Journal online and avers that the February 2000 issue of the Bar Journal was posted on the State Bar's website on

---

(affirming district court's grant of summary judgment and refusal to toll the statute of limitations until discovery) and *Shively v. Bozanich,* 31 Cal.4th 1230, 1250-51 (2003).

or about February 1, 2000 (*Id.* ¶ 6). She avers, "The State Bar's business practice around February 2000 was to check the website to make sure an edition of the California Bar Journal had been posted before paying any invoice" and "[t]o the best of [her] knowledge and the records of the State Bar, no edition of the California Bar Journal has failed to be posted at or around the same time as its physical publication" (McCarthy Decl. dated November 22, 2005, ¶ 6). Plaintiff deposed McCarthy. In her deposition, McCarthy again averred that the February 2000 issue of the Bar Journal was posted online on or about February 1, 2000 (Erlewine Decl., Exh. B 13:10-19, 19:1-11). She testified that "each month we'd just check to make sure [the Bar Journal] was up" and "we would go online to see if it was there" and she was never aware "that the edition for that particular month had not been posted online in the month that the hard copy had been mailed out" (*Id.* 85:12 - 86:9).

Neither of plaintiff's challenges to defendants' factual showing create a disputed issue of material fact such that summary adjudication of this issue is unwarranted. Plaintiff first argues that he and his staff could not locate the summary when they searched for it. Plaintiff relies heavily on the declaration of Adriano Hrvatin, a law student working in his office during the fall of 2002. Hrvatin declares that around October 2002, while navigating the State Bar's website, he "clicked on the link" entitled "Attorney Search" to "[c]heck an attorney's bar membership" and

then clicked on another link entitled "Attorney/Member Search" and typed "Canatella, Richard A." The search yielded plaintiff's page, which "noted that Mr. Canatella 'has a public record of discipline'" which could be obtained upon request (Hrvatin Decl. ¶ 4). Based on this search and others conducted between October 2002 and August 2003, Hrvatin declares he did not find the summary on the State Bar's website (Hrvatin Decl. ¶¶ 4, 6). Nowhere does Hrvatin declare that he logged on to that portion of the State Bar's website which archives past editions of the Bar Journal and that the summary was not in the February 2000 edition. Hrvatin does not establish that in 2002 the summary did not exist online; he only establishes that the State Bar had not yet provided a link between plaintiff's name and the summary. This is consistent with evidence presented by both sides that such a link was created in 2003.[6]

Plaintiff also provides the declaration of Dr. Crittenden. Dr. Crittenden does not offer any facts to controvert defendants' showing. He merely opines that he believes it highly improbable that the summary was posted when defendants assert.[7] His opinion is

---

[6] Plaintiff provides no support for his argument that linking the summary to plaintiff's membership records was a republication. *See infra* note 8. Nor is there any reason to make actionable a technological change that simplifies access to public information that is not objectionable. *See Mack v. State Bar*, 92 Cal.App.4th 957, 962-64 (2001).

[7] Dr. Crittenden is a sociologist by training but styles himself a "Computer Consultant." He declares "that Ms.

(Continued on following page)

not sufficient to create a disputed issue of material fact. *Triton Energy Corporation v. Square D Company,* 68 F.3d 1216, 1222 (9th Cir. 1995) ("Therefore, we find that Bennett's expert opinion and the inferences Triton seeks to draw from it are not of sufficient quantum and quality to create genuine issues of material fact.").

Plaintiff has failed to show that there is a genuine issue as to the material fact of when the summary in the February 2000 issue of the Bar Journal was posted online. Based on the record, I conclude plaintiff's summary was available on the State Bar's website in February 2000.

Plaintiff also appears to contend that the posting on the internet was a separate publication or republication of the summary which first appeared in the

---

McCarthy testified that the 'web master' does 'maintain a record of when something is actually posted on the internet.' However, she failed to bring those critical records with her to the deposition despite a request that she produce those records." (internal citations omitted) Since plaintiff did not append those portions of Ms. McCarthy's deposition in either electronic or hard copy form, they are not part of the record. In any event, plaintiff has still failed to establish that a material fact is in dispute. If plaintiff did request production of the "web master's" records and defendants did not comply, plaintiff could have asked me to compel production. If the "web master" could conclusively determine the date when the summary was posted, both sides could, and should, have submitted such conclusive evidence, but the record before me does not include it. I am unwilling to speculate what such evidence might be or why no party submitted it.

print version of the February 2000 Bar Journal. This contention has at least two problems. First, at the hearing, plaintiff conceded that the online summary was the same as the version published in the print edition. He admitted that he did not have any problems with the print version; his objection is to posting it on the internet (Transcr. of Proceedings on October 12, 2005, p. 7).[8] Plaintiff's contention that the mere act of posting an unobjectionable summary of his discipline record on the internet converted such summary into a false or misleading publication is unconvincing. If the print version is not defamatory or objectionable, it is hard to see how the electronic version can be.[9] Second, even assuming that a later publication of the same Bar Journal summary on a website constitutes a republication intended to reach a different audience, *Kanarek v. Bugliosi,* 108 Cal.App.3d 327 (1980), plaintiff's claim still falls outside the applicable statute of limitations. Under

---

[8] In his supplemental papers, he now argues that the summary is false and misleading because the defendants hid it in an obscure location on the internet. It is immaterial when the State Bar linked the summary to plaintiff's name or made it easily searchable. If the summary was online, then it was available to the public. Making a public document more accessible does not violate plaintiff's civil rights. *See Mack,* 92 Cal.App.4th at 962-64.

[9] To the extent that plaintiff argues that the State Bar does not have a right to publish discipline records online, that issue has already been decided against him. *Mack,* 92 Cal.App.4th at 962-63 (holding that the State Bar could publish on its website an attorney's record of private reproval and noting the policy favoring disclosure of public discipline records).

state law, the single publication rule applies to postings on the internet, *Traditional Cat Ass'n v. Gilbreath,* 118 Cal.App.4th 392, 403-404 (2004), so the latest this summary would have been republished was February 2000.

Under federal law, "a claim accrues when a plaintiff knows or *has reason to know* of the injury." *Maldonado,* 370 F.3d at 955 (emphasis added). Plaintiff knew or should have known that his discipline record would be public in 1999 when he stipulated to discipline to resolve charges pending against him. He concedes that he saw the summary in the print version of the Bar Journal in February 2000 (Transcr. 11:17-20). As a member of the State Bar, he should have received, and does not deny receiving, a variety of materials from the State Bar informing him that the Bar Journal was available on the internet (McCarthy Decl. dated November 22, 2005, Exhs. 1-18). By the time the Bar Journal published the summary in its February 2000 edition, the State Bar had been making the Bar Journal available online for four years, since January 1996. I find that he knew or should have known in 2000 that his summary would be available to the public, both in print and online. His attempts to check the State Bar's website in 2002 to see if his discipline record had been posted attest to this.

Plaintiff argues repeatedly that the statute of limitations began to run only when he discovered the online version in 2004 after former defendant Daetwyler cited it in a court proceeding. Plaintiff has

provided no authority for this proposition.[10] His reliance on cases such as *Hobart v. Hobart Estate Co.*, 26 Cal.2d 412 (1945) is misplaced since these cases interpret statutes of limitations which the California legislature has by statute decreed do not begin to run until discovery.

Plaintiff next argues that the statute of limitations in this case was equitably tolled because on March 29, 2000 he filed a federal suit challenging the constitutionality of State Bar statutes and a rule of conduct and seeking an injunction prohibiting the State Bar from taking disciplinary action against plaintiff under the challenged disciplinary rules. *See Canatella v. State of California,* 304 F.3d 843 (9th Cir. 2001). Plaintiff argues that the March 2000 action gave defendants timely notice of the need to defend against this claim, defendants have not been prejudiced by his failure to file earlier and he acted reasonably and in good faith in bringing the present action, so that the statute of limitations in the present action was equitably tolled.

---

[10] This case is distinguishable from *Schneider v. United Airlines, Inc.*, 208 Cal.App.3d 71 (1989) (holding that plaintiffs, whose credit was twice denied, had two separate causes of action against an airline which had transmitted allegedly false credit information to a credit reporting agency which had provided the information to two different banks on separate occasions). In cases such as this one, where plaintiff's summary was published in a magazine and on the internet and intended for mass distribution, the single publication rule should apply.

The filing of plaintiff's March 2000 action challenging various State Bar rules of discipline is not so related to the present suit,[11] which involves the online publication of the summary of plaintiff's discipline record, that defendants could be said to have had notice of this action in March of 2000. Nowhere does plaintiff explain how the filing of the March 2000 action put defendants on notice that the summary, which was not objectionable in print version, would produce this lawsuit if the summary were posted online. Nor is this case where plaintiff had to file the March 2000 action as a precondition to filing this suit. *Conley v. Brotherhood of Electrical Workers,* 810 F.2d 913, 915 (9th Cir. 1987) "Equitable tolling is most appropriate when the plaintiff is required to avail himself of an alternate course of action as a precondition to filing suit."). Courts have tolled the statute of limitations in cases of fraudulent concealment or in cases where plaintiff could not have reasonably discovered the facts giving rise to his claim. *Cusano,* 264 F.3d at 949. Neither is the case here. None of plaintiff's arguments establish a basis for equitably tolling the statute of limitations in this case.

The summary of plaintiff's discipline record was available on the State Bar's website in February 2000. Plaintiff did not file his suit until June 15,

---

[11] Notwithstanding his current arguments, plaintiff did not consider these cases sufficiently related to file a related case motion under Local Rule 3-12.

2005. Therefore, the statute of limitations period for plaintiff's claim expired before plaintiff filed his complaint.[12]

**IT IS HEREBY ORDERED:**

1. Defendants' motion to dismiss, which has been disposed of under Rule 56, is **GRANTED.** Plaintiff's motion for summary adjudication is **DENIED.**

2. Since plaintiff's action is time barred, plaintiff's motion for preliminary injunction is **DENIED** as moot.

3. There being no opposition, defendants' request for judicial notice in support of their motion to dismiss, submitted August 1, 2005 is **GRANTED.**

4. Defendants' request for judicial notice in support of their motion to dismiss, or alternatively, motion for summary judgment, submitted October 27, 2005 is **DENIED.** Absent foundational information about how the Internet Archive is constituted, I am not satisfied that this is a source whose accuracy cannot reasonably be questioned. *See* FRE 201.

---

[12] To the extent any state torts remain outstanding in plaintiff's complaint, having dismissed all federal claims, I decline to exercise supplemental jurisdiction. 28 U.S.C. § 1367(c)(3).

5. Defendants' request for judicial notice in opposition to plaintiff's motion for preliminary injunction is **DENIED** as moot.

6. Plaintiff's request for judicial notice in support of his motion for summary judgment is **GRANTED IN PART** and **DENIED IN PART.** Plaintiff's request is granted as to ¶¶ 1, 4 and 6 and denied as to ¶¶ 2, 3 and 5. Plaintiff's request as to ¶ 7 is granted, except as to the summary, which has not been authenticated.

7. Defendants' objections to the declarations of Richard Canatella and Butler Crittenden are **OVERRULED.** They go to the weight I attach to the evidence.

Dated: December 19, 2005

/s/ Bernard Zimmerman
Bernard Zimmerman
United States Magistrate Judge

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

| | |
|---|---|
| RICHARD A. CANATELLA,<br>Plaintiff-Appellant,<br>v.<br>JOHN K. VAN DE KAMP; MARIE M. MOFFAT; JAY GOLDMAN; NANCY MCCARTHY; CALFORNIA BAR JOURNAL; ROBERT HAWLEY; ZANASSI; MARTHA DAETWYLER,<br>Defendants-Appellees. | No. 06-15186<br>D.C. No. CV-05-02415-BZ<br>Northern District of California, San Francisco<br>ORDER |

(Filed Jul. 2, 2007)

Before: WALLACE and BYBEE, Circuit Judges, and PREGERSON* District Judge.

The panel judges have voted to deny appellant's petition for rehearing.

Judge Bybee has voted to deny the petition for rehearing en banc, and Judge Wallace and Judge Pregerson have recommended denying the petition for rehearing en banc.

* The Honorable Dean D. Pregerson, United States District Judge for the Central District of California, sitting by designation.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

Appellant's petition for rehearing and petition for rehearing en banc, filed May 17, 2007, is hereby DENIED.

---